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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 438

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Petitioner,

vs.

FIDALGO ISLAND PACKING CO., CLARA WILSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

J. GERALD WILLIAMS,
Attorney General of Alaska,
EDWARD A. MERDES,
Assistant Attorney General,
Attorneys for the Alaska Employment Security Commission.

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1. By refusing to recognize and apply the prevailing doctrine of simultaneous repeal and re-enactment which would compel the recognition of a continuing commission, the Circuit Court below adversely decided an issue of vital importance to the people of the Territory of Alaska, which is in direct conflict with: (a) applicable decisions of this court, (Bear Lake, et al. v. Garland, et al., (supra), Posadas v. National City Bank, (supra); (b) a decision of the Court of Appeals for the Second Circuit, Commissioner of Internal Revenue v. Emery, 62 F.2d 591, 592; and (c) a prior decision of its own, Goublin v. United States, 261 Fed. 5, 10-11 8

2. The Court of Appeals, by affirming the judgment of the trial court has in effect upheld the District Court's holding that: (a) Regulation No. 10 is void; (b) that plaintiff and intervenor need not exhaust an available administrative remedy; and (c) that plaintiff and intervenor may be irreparably damaged by enforcement of Regulation No. 10; thus the court below has decided questions of extreme importance to the Territory in a way that is in conflict with applicable territorial and general law 19

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The Attorney General of Alaska, representing the Employment Security Commission of Alaska, prays that a writ of certiorari issue to review the judgment entered in this case on June 21, 1956, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the District Court for the District of Alaska is reported at 120 F. Supp. 777. (Appendix "A".) The initial opinion of the Court of Appeals is found at 230 F. 2d 638. (Appendix "B".) The Court of Appeals' opinion disposing of the petition for rehearing is not as yet reported but is appended hereto. (Appendix "C".)

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1956. (Appendix "C".) The jurisdiction of this Court is invoked under Section 1254 of the New Federal Judicial Code. (28 U.S.C.A. 1254.)

QUESTIONS PRESENTED.

(1) Did the Court of Appeals err by refusing to recognize and apply the doctrine of simultaneous repeal and re-enactment as enunciated and laid down by this Court in *Bear Lake, et al. v. Garland, et al.*, 164 U.S. 1, 11-12 and *Posadas v. National City Bank*, 296 U.S. 497, 505?

(2) Did the Court of Appeals err in affirming that portion of the decision of the District Court holding that amended Regulation No. 10 was promulgated without authority and was in non-compliance with its enabling statute?

(3) Did the Court of Appeals err in affirming that portion of the decision of the District Court holding that the doctrine of exhaustion of administrative remedies has no application herein, notwithstanding the specific requirement of the Alaska statute, and of the general law, that persons allegedly aggrieved shall exhaust their administrative remedies before resort is had to the Court?

(4) Did the Court of Appeals err in affirming that portion of the District Court's decision holding that the failure of the Commission to pass upon the seasonal status of *all* Alaskan employers resulted in allowing the payments of benefits to all unclassified seasonal employees, thus causing an unnecessary drain on Alaska's Unemployment Compensation Trust Fund, thereby endangering its solvency, all to the alleged irreparable damage of plaintiff (appellee) and intervenor?

(5) Did the Court of Appeals, in substantiating its decision upon unidentified legislation developments, occurring subsequent to trial and after argument in the Appellate Court there having been no reference by counsel to any such legislation at any time, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

STATUTES.

The pertinent portions of the statutes involved are set out in Appendices "D", "E", "F", "G", "H" and "I".

STATEMENT.

On June 29, 1953, Benefit Regulation No. 10 (R. 9-11) was issued by the Executive Director of the Alaska Employment Security Commission pursuant to a previous delegation of authority by the Commission. In substance, this Regulation specified the particular seasonal periods during which unemployment benefits would be payable to employees of the salmon canning industry.

Regulation No. 10 had as its purpose and effect to restrict the payment of unemployment compensation to salmon cannery employees for only those days of unemployment occurring during the regular summer canning season. In other words, since in Alaska the catching and canning of salmon is a seasonal activity, the regulation prohibited the payment of benefits during the fall, winter and early spring seasons when, due to the absence of salmon in Alaskan waters, it is impossible to catch and can the same.

In late summer of 1953 (July 30), the Fidalgo Island Packing Company filed suit to enjoin the enforcement of said Regulation No. 10.

On May 7, 1954 and following trial, the District Court issued its written opinion holding, among other things, that (R. 42-54):

(1) Benefit Regulation No. 10 was issued without authority and was therefore void.

(2) The doctrine of exhaustion of administrative remedies had no application herein.

(3) Section 7 of Chapter 99, Session Laws of Alaska 1953 required the Unemployment Com-

pensation Commission to determine the seasonal status of every employer in Alaska, and that its failure to do so, while classifying the salmon cannery employers under Amended Regulation No. 10, was discriminatory and hence the regulation was void.

(4) That the failure to classify all other Alaska employers who were allegedly seasonal, caused a serious drain on the unemployment fund and that this "threatened injury" was "irreparable in character".

Thereafter, judgment was entered permanently enjoining the defendant, or any of his agents, from enforcing the regulation. (R. 65-67.) The District Court, in lieu of requiring a supersedeas bond by the Commission and pursuant to stipulation, impounded by court order the sum of $650,000.00 representing benefit payments that would be disbursed if the validity of Amended Regulation No. 10 was not sustained on appeal. (R. 72-75.)

On June 11, 1954, the Attorney General filed a notice of appeal from the trial court's judgment. (R. 67.)

On September 13, 1955, the Court of Appeals for the Ninth Circuit issued its per curiam opinion. (Appendix "B".) After stating that the case was "extremely confusing", in substance, it held, without citing a single authority, case or statute, that:

(1) This amended regulation was supposedly issued by and under the authority of the Em-

ployers Security Commission which was no longer in existence at the date of the issuance thereof.

(2) "A regulation cannot be issued by a Commission which is no longer in existence. Any delegation of authority by the old Commission became null and void when the body itself was abolished."

(3) There was "no doubt of the validity of the result" because of "other legislative developments in this field since the cause was tried."

On October 13, 1955, the Attorney General on behalf of the Commission, filed a Petition for Rehearing. The basis for the petition was that:

(1) The Alaska Employment Security Commission was, in fact, in existence at the time Regulation No. 10 was promulgated;

(2) The doctrine of simultaneous repeal and re-enactment as announced by this Court in *Bear Lake, et al., v. Garland, et al.,* (supra) and *Posadas v. National City Bank,* (supra) was controlling and required the Court to find that a continuity of Commissions existed;

(3) The plaintiff and intervenor (appellees) made no attempt to exhaust their administrative remedies;

(4) The complete failure of plaintiff and intervenor (appellees) to show that they were irreparably damaged;

(5) The crippling effect of the District Court's decision and the Court of Appeals' af-

firmance thereof, on the Employment Security program in Alaska; and

(6) No subsequent legislative enactments affected the issues in this case.

On June 21, 1956, the Court of Appeals issued its written opinion denying this petition. (Appendix "C".) The Court, held, again without citing a single authority, that:

(1) The jurisdiction of "* * * the old commission over the subject matter had expired by abolition of the agency."; thus

(2) "The delegated power to the Executive director of the old commission expired when it went out of existence.",

(3) The Executive Director's "purported action in the interim between the expiration of his delegation of power by the old commission and the organization of the new commission was void, not voidable, because no body had jurisdiction of the subject matter at the time and he had no delegated authority to act in the premises.",

(4) "The fact that the acts abolishing one body and creating another were passed simultaneously is without significance.", and

(5) "* * * an emergency has obviously been prevented by federal legislation."

REASONS FOR GRANTING THE WRIT.

1. **BY REFUSING TO RECOGNIZE AND APPLY THE PREVAILING DOCTRINE OF SIMULTANEOUS REPEAL AND RE-ENACTMENT WHICH WOULD COMPEL THE RECOGNITION OF A CONTINUING COMMISSION, THE CIRCUIT COURT BELOW ADVERSELY DECIDED AN ISSUE OF VITAL IMPORTANCE TO THE PEOPLE OF THE TERRITORY OF ALASKA, WHICH IS IN DIRECT CONFLICT WITH: (a) APPLICABLE DECISIONS OF THIS COURT, (Bear Lake, et al. v. Garland, et al., (supra), Posadas v. National City Bank, (supra); (b) A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT, Commissioner of Internal Revenue v. Emery, 62 F.2d 591, 592; AND (c) A PRIOR DECISION OF ITS OWN, Goublin v. United States, 261 Fed. 5, 10-11.**

In its opinion disposing of the Commission's Petition for Rehearing, the Court of Appeals stated as follows:

> "The fact that the acts abolishing one body and creating another were passed simultaneously is without significance." (App. C.)

This brief statement neatly epitomizes what we believe is the commission of serious error and therefore, constitutes one of the primary reasons we are asking the Supreme Court to review. We contend, contrary to the Court of Appeals herein, that where there is an express repeal of an existing statute, [Chapter 82, SLA 1953 repealed Section 51-5-10 ACLA 1949], and an immediate re-enactment of the same statute, with minor modifications, [Chapter 83, SLA 1953 re-enacted Section 51-5-10 ACLA 1949], the re-enactment neutralizes the repeal and the old law is continued in force, so that offices are not lost, and power is not taken away. *Goublin v. United States*, (supra), 261 Fed. 5, 10-11 and cases and authority cited therein.

Amended Regulation No. 10[1] was issued by the Executive Director pursuant to an express delegation of authority to promulgate regulations when the Commission was not in session. Such a delegation by the Commission to the Director was expressly permitted by Section 51-5-1 (f) ACLA 1949 which read as follows:

> "(f) 'Commission' means the Unemployment Compensation Commission established by this Act *or any person to whom this Commission may delegate its powers and duties.*" (Emphasis added.)

Pursuant to the above statute, the Commission formally promulgated Regulation No. 16:

> "Regulation 16, *wherein power was granted to the Director to make rules and regulations* when the Commission is not in session, was adopted. Such rules and regulations are to be in effect in the regular procedure until such time that the Commission at their next meeting either approves or disapproves such rules and regulations." (R. 161 and 162.) (Emphasis added.)

On June 29, 1953, the Executive Director, in behalf of the Commission and in accordance with the above delegation of authority, issued the crucial Amended Regulation No. 10, which regulation prescribed seasonal periods for cannery employers and thus restricted the payment of unemployment benefits during these prescribed seasonal periods.

The Court of Appeals held that the Executive Director had no authority to issue Regulation No. 10

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[1]Regulation No. 10 is set forth in full in Appendix "J".

for the reason that "the delegated power to the Executive Director of the old Commission expired when it went out of existence." (App. "C".)

A comparison of the repeal statute (which created the original Commission) and the re-enacted statute is set forth in the table below:

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
"(a) *Organization.* There is hereby created a Commission to be known as the Unemployment Compensation Commission of Alaska. The Commission shall consist of three members, who shall be appointed by the Governor, by and with the consent of the Legislature, as soon as possible after the passage and approval of this Act and thereafter when any vacancy occurs in its membership. During his term of membership on the Commission no member shall serve as an officer or committee member of any political party organization, and not more than two members of the Commission shall be members of the same political party. Each member shall hold office for a term of six years, except that:	"Section 1. There is hereby created a commission to be known as the Employment Security Commission of Alaska. The Commission shall consist of four members, who shall be appointed by the Governor, by and with the consent of the legislature, in joint session of both houses, as soon as possible after passage and approval of this Act. Members of the Commission shall be residents of the Territory of Alaska and citizens of the United States, over the age of twenty-one years. Not more than two members of the Commission shall be of the same Political Party. Two members shall be representative of industry or management and two shall be representative of labor. Each member shall hold office for a term of six years, except that:
(1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was ap-	(1) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was ap-

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
pointed shall be appointed for the remainder of such term; and	pointed, shall be appointed for the remainder of that term; and if a vacancy occurs at a time when the legislature is not in session, through death, resignation, removal or disqualification, under this Act, a new member shall be appointed by the Governor to fill the vacancy who shall have the qualifications herein prescribed and who shall hold office for the remainder of the term for which his predecessor was appointed; and
(2) the term of office of the members first taking office after the date of enactment of this Act shall expire, one February 1, 1939, one February 1, 1941, and one February 1, 1943. The members of the Commission shall be Territorial officers and before entering upon the duties of their office shall take the oath of office prescribed for Territorial officers. The Governor may at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty or malfeasance in office.	(2) The terms of office of the members first taking office after the date of the enactment of this Act shall begin on the date of their appointment and shall expire, one on February 1, 1955, one on February 1, 1957, one on February 1, 1959 and one on February 1, 1961. The members of the Commission shall be Territorial officers, and before entering upon the discharge of their duties, shall take such oaths of office as are prescribed for Territorial officers. The Governor may, at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance in office, or commission of a crime.
Upon the expiration of the term of a member the Governor shall submit the name of his	Upon the expiration of the term of a member, the Governor shall submit the name of a suc-

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
successor for confirmation by the Legislature then in session; if the Governor fail to submit such name the incumbent shall continue to hold office and shall continue to perform the duties thereof until his successor shall have been appointed and his appointment confirmed by the Legislature as in this Section provided, and no recess or interim appointment shall be made in such case.	cessor for confirmation by the legislature then in session; if the Governor does not submit such name, the incumbent shall continue to hold office and to perform the duties thereof until his successor shall be appointed and confirmed by the legislature, as in this section provided, and no recess or interim appointments shall be made in such cases.
(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Five Thousand Two Hundred and Fifty Dollars ($5,250.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.	(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Eight Thousand Five Hundred Dollars ($8,500.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.
(b) *Compensation of Commissioners.* One of the members	(b) One of the members of the Commission so appointed

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
of the Commission so appointed shall be the chairman of the Commission. The members of the Commission shall not receive any fixed salary but shall be paid at the rate of Ten Dollars ($10.00) per day plus necessary expenses while engaged in the actual performance of their duties but no commissioner shall in any event receive more than One Thousand Dollars ($1,000.00) salary in addition to expenses for any calendar year. The salaries of all commissioners shall be paid from the unemployment compensation administration fund. The chairman of the Commission shall be designated by the Governor.	shall be chosen by all members as Chairman of the Commission. Members of the Commission shall be reimbursed for actual travel expenses and shall receive a per diem allowance for each day that they are away from home in connection with their official duties in carrying out the purpose of this Act. The reimbursement of all Commissioners shall be from the Employment Security Commission administration fund.
(c) *Quorum.* Any two Commissioners shall constitute a quorum. No vacancy shall impair the right of the remaining Commissioners to exercise all of the powers of the Commission."	(c) Any three Commissioners shall constitute a quorum, and no vacancy shall impair the rights of the remaining Commissioners to exercise all the powers of the Commission."

The most cursory examination of these two statutes immediately discloses that they are virtually identical save for minor modifications and the enlarging of the commission to include one additional member. Indeed the trial Court recognized this identity by stating:

> "Section 51-5-10 A.C.L.A., 1949, was repealed by Chapter 82, S.L.A. 1953, effective June 26, 1953. The effect of this was the abolition of the

> Commission. Chapter 83, S.L.A. 1953, effective June 26, however, *substantially re-enacted the provisions repealed.* * * *" (R. 45.) (Emphasis added.)

House Bill No. 128, which became Chapter 82, (the repealing statute) and House Bill No. 129, which became Chapter 83 (the re-creating statute) were passed within minutes of one another and became law on the same day.[2]

Since these two statutes were, for all practical purposes, repealed and simultaneously re-enacted, it is our contention that the Court below erred in refusing, after having been twice urged to do so, to apply the doctrine of simultaneous repeal and re-enactment, as enunciated by this Court in *Bear Lake, et al. v. Garland, et al.,* (supra), and *Campbell v. California,* 200 U.S. 87, 92; *Posadas v. National City Bank,* (supra).

If the Court below had applied the *Bear Lake* rule then it would have been compelled to hold that the setting aside of the original law creating the Commission and the concurrent enactment of a new statute, adding a member, did not in any manner vitiate the delegated authority of the executive director to issue rules and regulations, including Regulation No. 10, while the commission was not in session.[3]

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[2]See 1953 Alaska Senate Journal, pages 923, 924; 60th Day, Appendix "K".

[3]It is undisputed that the Commission was not in session on June 29, 1953, the date amended Benefit Regulation No. 10 was issued.

The trial judge summarily rejected Fidalgo Island's argument that the executive director's authority had expired and there was no commission in existence with whom an administrative appeal could have been lodged. The following is found in the District Court's opinion:

> "* * * the plaintiff and intervenor contend that the authority delegated to the defendant expired with the abolition of the Commission by Chapter 82, that there was no Commission to appeal to until August 6th, when it met for the first time, and that in any event an appeal would have been futile because, when the new Commission finally met in October, it became deadlocked by reason of a tie vote on every major issue and, hence, was unable to function." (R. 48.)
>
> "The last contention may be disposed of by the observation that the application of the doctrine does not depend on what may be said in retrospect. Here, as in analogous situations, diligence is the criterion. *The remaining contentions are in my opinion untenable for, apparently, the new members of the Commission had qualified,*[4] and in any event an appeal may be prosecuted although the appellate tribunal is not in session." (R. 48.) (Emphasis added.)

With this statement of the trial Court, we wholeheartedly agree. It recognized, unlike the Court of Appeals, that there was no period during which there

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[4]See Appendix "L" or Defendant's Exhibit "C" (R. 63). This "Certification of Appointment" by the Secretary of Alaska discloses that all four members of the Commission were appointed on June 24, 1953—five days *before* Regulation No. 10 was issued.

was any alleged non-existence of a Commission. Furthermore, there is an implicit recognition throughout the trial judge's opinion of the executive director's authority to act in behalf of an existing commission. But, the trial judge held that the director exercised a power delegated to him non-delegable in nature and that the regulation did not comply with the enabling act. (R. 49-50.)

Both "per curiam" opinions of the Court of Appeals disclose that its decision is predicated upon the erroneous conclusion that there was no commission in existence at the time Regulation No. 10 was promulgated. The Court of Appeals' ruling on this point is in direct conflict with this Court's holding in *Bear Lake, et al. v. Garland, et al.,* (supra), and *Posadas v. National City Bank,* (supra).

In the *Bear Lake* case at 164 U.S., page 12, this Court clearly stated:

> "* * * As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act."

In accord:

Bingaman v. Golden Eagle, 297 U.S. 626, 628;
Campbell v. California, 200 U.S. 87, 92;
Commissioner of Internal Revenue v. Emery, 72 F. 2d 591, 592 (2d Circuit);

Goublin v. United States, 261 Fed. 5, 10-11 (9th Circuit);

Sutherland on Statutory Construction, 3rd Ed., Section 2035, page 513;

50 *Am. Jur., Statutes*, Section 533;

82 *C.J.S. Statutes*, Section 295.

The Court below in the *Goublin* case, 261 Fed. at page 11 quotes with approval, Professor Sutherland's statement of the rule:

> " 'Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, * * * the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. * * * Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, * * * by such repeal and re-enactment of the law on which they respectively depend.' "

The reasoning behind such a rule can be no better exemplified than by pointing out the resulting absurdity if it is *not* applied herein. Between the time the time the repealing statute became effective (June 26, 1953) and the time the newly appointed commission first met, (August 6, 1953—R. 59), the executive director, in addition to promulgating Regulation No. 10, performed numerous other important duties and functions, authority for which emanated from previous delegation of power from the Commission which Commission was allegedly abolished by Chapter 82. Thus,

his authority to sign travel vouchers, sign benefit checks, conduct administrative appeals and hearings, approve all purchase requisitions, and in general, supervise the operation of the agency, can all be traced back to prior delegations by the Commission.[5]

If the Court of Appeals' conclusion is to be upheld, it can readily be seen that all of the actions of the director taken in the interim period are void. It is compelling and apparent that one of the primary reasons for the judicial recognition of the rule of simultaneous repeal and re-enactment is to obviate this type of chaos. Every Federal, State and Territorial agency operating under the guidance of a commission will be jeopardized whenever all members of a commission resign or an attempt is made to modify or improve original legislation creating such bodies.

As a result of refusing to apply the simultaneous repeal and re-enactment rule to this case, the Court below not only decided an important territorial issue in conflict with settled decisions of the Court but has jeopardized the solvency of the Territory's Unemployment Compensation Trust Fund by authorizing the disbursement therefrom of $650,000.00 in impounded funds. (R. 72.)

The impact of the Court of Appeals' denial to apply this rule cannot be minimized. As a result of the issu-

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[5]Employment Security Commission, Alaska, Fiscal Regulation No. 1, effective June 24, 1953, Section 1(a) and 4 thereof: Section 51-5-9(c)—authorized the Commission or authorized agent to sign benefit checks; Fiscal Regulation No. 4, Section 3, effective March 4, 1950—required approval of Executive Director on all purchase requisitions.

ance and enforcement of Regulation No. 10, $650,000.00 has been retained in Alaska's badly depleted Unemployment Compensation Trust Fund a substantial portion to which monies "but for" the regulation would have been and—if the Court of Appeals' decision is upheld—will be disbursed to seasonal cannery employees for unemployment occurring during the seasons when the canning of salmon is impossible.

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2. THE COURT OF APPEALS, BY AFFIRMING THE JUDGMENT OF THE TRIAL COURT HAS IN EFFECT UPHELD THE DISTRICT COURT'S HOLDING THAT: (a) REGULATION NO. 10 IS VOID; (b) THAT PLAINTIFF AND INTERVENOR NEED NOT EXHAUST AN AVAILABLE ADMINISTRATIVE REMEDY; AND (c) THAT PLAINTIFF AND INTERVENOR MAY BE IRREPARABLY DAMAGED BY ENFORCEMENT OF REGULATION NO. 10; THUS THE COURT BELOW HAS DECIDED QUESTIONS OF EXTREME IMPORTANCE TO THE TERRITORY IN A WAY THAT IS IN CONFLICT WITH APPLICABLE TERRITORIAL AND GENERAL LAW.

As stated heretofore, the Court of Appeals did not decide the case on the same grounds relied on by the trial Court. Wherein the Court of Appeals decided on the single issue of the alleged non-existence of a commission, the district judge resolved the case, to his satisfaction, on the merits. (R. 48.) The following are the grounds he advanced in support of his conclusion that Regulation No. 10 was invalid:

(a) That in issuing Regulation No. 10, on behalf of the Commission, the executive director exercised a power that is discretionary and nondelegable in nature. (R. 49-50.)

(b) That Regulation No. 10 by only classifying the salmon industry as seasonal ignored the mandate of the law that *all* employing units must be classified as seasonal or non-seasonal and its failure to do so was discriminatory. (R. 50-51.)

(c) That since under no circumstances could the regulation be upheld, the plaintiff's failure to exhaust its administrative remedy is immaterial since that doctrine is not applicable when a void regulation is involved. (R. 51-52.)

(d) That the failure to classify employers in the construction industry as "seasonal" has caused a depletion of the unemployment trust fund by the payment of compensation to employees of that industry which in turn require greater contributions by, and the loss of credit ratings to, the plaintiff, as an employer, and decreased benefits to the intervenor, as an employee. (R. 52.)

Petitioner submits in brief outline, the following arguments in repudiation of the premises upon which the District Court rested its opinion:

In Re (a): That in issuing Regulation No. 10, on behalf of the Commmission, the executive director exercised the power that is discretionary and non-delegable in nature.

I.

The Executive Director Was Duly Delegated the Authority by the Employment Security Commission to Promulgate Regulation No. 10.

Implicit in the trial Court's ruling is the recognized fact that the executive director was acting on behalf of an existing commission. However, it was the district judge's view that the power exercised by the director was of a discretionary nature and non-delegable. (R. 50.) With the last part of the above sentence, the petitioner wholeheartedly disagrees.

Section 51-5-1 (f) ACLA 1949, expressly permitted the Commission to delegate its powers, placing no limitation thereon. Thus, the only question to be discussed hereunder is whether the power re-delegated to its Executive Director was properly exercised.

Section 7 of Chapter 99, SLA 1953 is the enabling statute that prescribed the standards for a seasonality regulation and which authorized the issuance of such a regulation by the "Commission".

In view of the Commission being authorized without limitation to delegate "its powers and duties", including the issuance of regulations, and having in fact delegated such power to the executive director, the word "director" can be substituted whenever the word "Commission" appears in Section 7 of Chapter 99, SLA 1953. The reason for allowing such a substitution is readily apparent. If the legislature has the power to authorize a commission to promulgate a seasonality regulation (which nobody disputed it has the power to do) in accordance with the specific

criteria set forth in the above enabling act, *'a fortiori'*, the legislature has the power to authorize the Commission to re-delegate its regulation-making authority.

Therefore, the trial Court erred when it made the following statement:

> "I am of the opinion therefore, that the determination of seasonality was neither delegated nor intended to be delegated. An examination of the law discloses that the determination of seasonality is not only one of the most important functions of the Commission but also one that must be performed before the law can become fully operative. It is inconceivable that the exercise of this function would be delegated." (R. 50.)

In this personal opinion of the trial judge he failed to consider Section 51-5-1 (f), supra, and distinguished between an unlawful delegation of a legislative function to an administrative agency, (Cf. *Schechter v. United States,* 295 U.S. 495; *Panama Ref. Co. v. Ryan,* 293 U.S. 388; 42 *Am. Jur., Public Administrative Law,* Section 49) and a case, such as this, where the Territorial Legislature made an admittedly lawful delegation of power, properly circumscribed by specific standards, to an administrative agency and then, by separate statute authorized the same agency to re-delegate the power to "any person". An examination of its minutes shows that the commission was not as generous as the legislature authorized it to be in the matter of delegating its powers. It only permitted its director to issue rules

and regulations between sessions and subjected the exercise of this power to careful scrutiny at the next meeting.

Twenty-six (26) states provide for a single executive head without a board or commission to administer its employment security laws.[6] Merely because in Alaska the Legislature created a commission to administer the territory's law does not preclude the same legislature from authorizing the commission it created to re-delegate its powers to "any person" including its executive head.

In Re (b): That Regulation No. 10, by only classifying the salmon industry as seasonal, ignored the mandate of law that all employing units must be classified as seasonal or non-seasonal and its failure to do so constitutes discrimination.

II.

There Was No Mandate of Law That the Seasonal Status of All Employing Units in Alaska Be Passed Upon at the Same Time.

The statute quoted below clearly shows that the legislature vested wide latitude and discretion in the Commission concerning seasonality classification. It is difficult to perceive how a reasonable person can read into the statute the requirement that the Com-

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[6]"Comparison of State Unemployment Insurance Laws" as of December, 1955, 115-116, by U. S. Department of Labor, Bureau of Employment Security, 1956.

mission *must* concurrently classify *all* employing units as seasonal or non-seasonal and its failure to do so constitutes unlawful discrimination against employing units which are not so classified:

"(c)(1) Seasonal Employer. As used in this section the term 'seasonal employer' means an employer or operating unit of an employer which because of the seasonal nature of its operations, reduces its employment to such an extent that its monthly payroll for each of three consecutive months in each of two consecutive calendar or operating years immediately preceding the year for which the determination is made, is less than one-half the average monthly payroll for the three consecutive months of highest payroll in the same calendar or operating years. No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission. A successor in interest of a seasonal employer or operating unit shall be deemed seasonal upon the same basis as the predecessor unless determined otherwise by the Commission.

(2) Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.

When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation."

If the Commission was required to concurrently classify all Alaskan employing units it would not make sense for the legislature to require it to make investigations, conduct hearings, etc. If the Trial Court's construction of the statute were valid, all the Commission need do is to apply the Section 7 (c)(1) payroll formula to all employing units then issue the seasonal regulation. Under such a procedure there certainly would be no need to conduct hearings and "use as a guide data relating to the best practices of the industry." It is apparent that the gist of the statute was to vest discretion in the Commission in the matter of seasonally classifying employers. The wisdom of this approach is apparent in the case of temporary plant shutdowns for inventorying, tool changes, etc. Under the trial Court's interpretation these employers, who are not seasonal at all, would meet the payroll formula and be classified.

Even if the statute is read as requiring the Commission to determine the seasonal status of every employing unit in Alaska such a momentous task could not be possibly accomplished during the short time that elapsed between the effective date of Section 7 of Chapter 99 (April 1, 1953) and the date Regulation No. 10 was issued (June 29, 1953). The issuance of this regulation may very well have been the first phase of a program to, in fact, determine the seasonal status of all Alaskan employers. Its issuance certainly did not preclude the Commission from subsequently determining the status of other Alaskan employers. The vice of the District Court's error was

its assumption that the promulgation of Regulation No. 10 was the only action the Commission intended to take concerning the seasonality problem. At the least the Court should have given the agency a year to work on the problem before it entertained a lawsuit on July 30, 1953, a mere four months after the effective date of Section 7 of Chapter 99.

In Re (c): That since under no circumstances could the regulation be upheld, the plaintiff's failure to exhaust its administrative remedy is immaterial since that doctrine is not applicable when a void regulation is involved.

III.

The Plaintiff and Intervenor Failed to Even Attempt to Exhaust an Available Administrative remedy.

The pertinent part of Section 7 (c)(2) of Chapter 99, SLA 1953 which prescribes this remedy reads as follows:

> "Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination. An appeal shall be made to the Commission stating

therein why the determination is appealed. After affording the parties a reasonable opportunity to submit briefs with respect to the determination appealed from, the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7 (h) herein."

Section 51-5-7 (h) ACLA 1949 states:

"(h) Appeal to Courts. Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the Commission and designated by it for that purpose, or at the Commission's request by the Attorney General."

During the trial the plaintiff argued "that there was no Commission to appeal to". (R. 48.) The trial Court disposed of this contention as follows:

"* * * The remaining contentions are in my opinion untenable for, apparently, the new members of the commission had qualified, and in any event an appeal may be prosecuted although the appellate tribunal is not in session." (R. 48.) (See Appendix "L" herein which shows that all members of the Commission were appointed on June 24, 1953.)

But the trial Court went on to hold that the exhaustion of remedies rule was not applicable because: (1) the director has no authority to issue Regulation No. 10, (2) that it was not promulgated in compliance with the law, and (3) it is wrong to require plaintiff to exhaust his remedy by way of administrative appeal "in a case in which it would appear that under no circumstances could the regulation ultimately be upheld." (R. 51.)

All of these reasons are predicated on the erroneous construction of Chapter 99, SLA 1953. See subparagraphs (a)(b), supra.

The plaintiff and intervenor admittedly did not follow the statutory appeal procedure prescribed by the statute. It has been shown that Regulation No. 10 is a valid regulation. It must therefore follow that for their failure to exhaust available administrative remedies plaintiff and intervenor should not be permitted to have recourse to the Courts. Cf. *Regal Knitwear Co. v. National Labor Relations Board,* 324 U.S. 9; *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U.S. 177; *United Fuel Gas Co. v. Railroad Comm.,* 278 U.S. 300, 309-310; *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41. A pertinent observation relative to exhaustion of administrative remedies was made by this Court in a recent case dealing with Alaska's Employment Security program. In *Unemployment Compensation Commission v. Aragon,* 329 U.S. 143, 155, it was pointed out:

> "* * * The responsibility of applying the statutory provisions to the facts of a particular case

was given in the first instance to the Commission. A reviewing court usurps the agency's function when it * * * deprives the commission of an opportunity to consider the matter, * * *."

In Re (d): That the failure to classify employers in the construction industry as seasonal has caused a depletion of the Unemployment Trust fund by payment of benefits to employees of that industry which in turn require greater contributions by, and the loss of credit ratings to, the plaintiff as an employer and decreased benefits to the intervenor, as an employee.

IV.

There Has Been No Showing of Irreparable Damages or Any Threat Thereof.

On page 18 of its brief in District Court, appellee makes this statement:

"* * * If plaintiff is obliged to pay into this fund any amount of money which, under some regulation such as the one in question, may not be credited to plaintiff for the purpose for which it was paid in, plaintiff has been irreparably injured * * *."

In the District Court the plaintiff argued that as a result of the rapid depletion of the fund, "* * * the contributors are bound to suffer injury and the employees are bound to suffer irreparable injury * * *" (Page 15 of appellee's brief in trial Court.) The District Court held that the claim of alleged irreparable

damage "* * * is based, in the main, on the progressive elimination of the fund * * *" (R. 52.)

The District Court made the following findings of fact concerning the manner in which the appellee allegedly has been irreparably injured (R. 60):

> "12. That the plaintiff has been irreparably injured and will be further irreparably injured by the application of pretended amended regulation No. 10 to it and others on whose behalf this action is brought, for the reason (1) that the pretended amended Regulation No. 10 does not set up the proper seasons or periods during which they carry on their fishing and canning operations in the Territory and (2) it does not properly define the seasons, which would result actually in making some employees of the plaintiff and others seasonal, and other employees nonseasonal, although all are engaged in the same employment." (Captioned numbers added.)

Both of these grounds are fallacious. The record discloses that the canned salmon industry requested that a seasonality regulation be issued based upon the open fishing season prescribed by the Federal Fish and Wildlife Service. (R. 217-218.) Appellee is now most certainly estopped to deny any alleged irreparable injury resulting from the promulgation of the very type of regulation it requested to be issued. Furthermore, it can hardly be disputed that the Commission is in the better position to "set up the proper seasons or periods during which they carry on their fishing * * *". This points to an additional reason why appellee should have been denied judicial review

until after the regulatory Commission has had an opportunity to consider these type objections. It may very well have been that the Commission would have changed the regulation to appellee's liking had it been given a chance to do so.

In findings of fact No. 18 (R. 63), the District Court found that the appellee has already been injured and will be further injured if the fund is depleted, for, in such an event, much greater employer contributions will be required to continue payments.

First, the most obvious fallacy in this finding is the fact that the regulation which is the subject matter of this suit actually is designed and does preserve the solvency of the fund; and second, there is no evidence showing in what manner the appellee is irreparably injured. In no event shall the contributions be increased by anyone save the legislature, and when and if such contributions are raised or lowered, there are numerous complex factors, of which seasonality constitutes only one narrow element, that enter into a final decision. Appellee has not shown that it has paid one extra cent in contributions between the time of this suit and the present, resulting from the promulgation of seasonality regulation No. 10.

As indicated in the above quote from page 18 of appellee's brief in District Court, the argument was presented for the first time after trial that the enforcement of Regulation No. 10 caused monies appellee paid into the fund "not be credited to plaintiff for the purpose for which it (the monies) was paid in." This argument is not in accord with reality or the proof

submitted by Fidalgo Packing Company in the course of the trial. Regulation No. 10 most certainly does not cause monies to be credited for purposes other than those for which it was paid in. The enforcement of the regulation caused monies to be retained in the fund that would otherwise be paid out.

As to the intervenor's status, counsel was forced to admit that due to the fact that she is a nonseasonal employee "she will no longer be injured by the fact that the seasonal regulation as applied to her, is unrealistic." (Quoted on page 23 of appellee's brief in District Court.)

These conflicting contentions clearly exemplify the paradoxical position appellee has taken throughout the litigation in its attempt to portray itself as a representative of seasonal employees in the salmon industry. There is simply no casual relationship between the enforcement of the regulation, the depleted fund, and alleged irreparable damages the appellee and intervenor are supposedly suffering.

Finally, this Court has ruled that an injunction should not issue against a public agency unless the need for the same is clear and not remote or speculative. *Eccles v. Peoples Bank,* 333 U. S. 426, 431.

3. **BY PREDICATING ITS DECISION, IN PART, UPON LEGISLATIVE DEVELOPMENTS OCCURRING SUBSEQUENT TO TRIAL WHICH HAVE NO CONCEIVABLE BEARING ON THE ISSUES IN THIS CAUSE AND WHICH NEITHER COUNSEL PRESENTED TO THE COURT IN ANY MANNER, THE COURT BELOW HAS SO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

In its original per curiam opinion the Court of Appeals made this seemingly anomalous observation:

> "We indicate no doubt of the validity of the result by recognizing that there are other legislative developments in this field since the cause was tried." (Appendix "B".)

And again in its per curiam opinion, denying our petition for rehearing, the Court made this rather startling statement:

> "On the other hand, an emergency has obviously been prevented by federal legislation."

These statements by the Court of Appeals are indeed perplexing. We are not at all sure what "other legislative developments" validates its decision. The underlying issue then before the Court and which will be presented to this Court if certiorari is granted is whether or not amended Regulation No. 10 is a valid Regulation. After final determination of this issue, appropriate disposition will be made of $650,000.00 in impounded unemployment trust funds.

No subsequent legislation either Territorial or Federal has in any manner whatever effected the determination of that or any other issue involved in this litigation.

However, there have been three legislative enactments, two Territorial and one Federal, relative to Alaska's Employment Security program.

(First) Congress enacted a statute[7] which authorized Alaska's Employment Security Commission, notwithstanding restrictions against borrowing in the Territory's Organic Act, to apply for a loan from the Federal Government in order to replenish the Territory's depleted unemployment compensation fund.[8] Application was in fact made by the Territorial Governor to the Federal Government for a loan, and on

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[7]Public Law 56, 84th Congress approved by the President June 1, 1956.

[8]42 U.S.C.A. 1321 authorizes the Secretary of Labor to make advancements to state unemployment funds which are in a depleted condition. Section 3302(c)(2) (26 U.S.C.A. 3302), in effect increases the payroll taxes paid by the employers in the borrowing state to be applied in re-payment of the loan in the event the state unemployment fund has an insufficient balance to re-pay the same. The technical explanation of the manner in which re-payment is assured the Federal Government is set forth in page 1 of the 1955 Annual Report of Alaska's Employment Security Commission as follows:

> "If repayment of the entire amount received by Alaska from the Federal unemployment account is not completed by December 1 of the fourth full calendar year following the date on which the earliest advance remaining unpaid was made, automatic repayment sets in. This is accomplished by a reduction in the offset which Alaska's employers who are subject to the Federal Unemployment Tax Act (on and after January 1, 1956, employers of four or more for twenty weeks during the year (instead of eight or more) will be liable for the Federal Tax) may claim against their Federal tax liability. Beginning with the tax due for that fourth full calendar year, the offset allowable is reduced by 5 percent of the 3.0 percent tax liability, so that the maximum offset is reduced from 2.7 to 2.55 percent of covered payrolls. If any indebtedness continues into the next taxable year, the offset is further reduced from 2.55 to 2.4 of covered payrolls and so on, year after year, until the advance is paid off."

July 1, 1955, the Territory received a $3,000,000.00 loan from the Federal Government.[9]

(Second) Chapter 8, Extraordinary Session Laws of Alaska, 1955, was enacted by the Territorial Legislature. This statute authorized the issuance of a $2,000,000.00 loan from the Territorial General Fund to the unemployment compensation fund. $1,800,000.00 was borrowed under authority of this statute in order to avoid a complete breakdown of Alaska's Employment Security program.[10]

On June 7, 1955, pursuant to express authority to do so in Public Law 56, 84th Congress, the Commission repaid to the Territorial General Fund, from the $3,000,000.00 loan it received from the Federal Government, the $1,800,000.00 it had previously borrowed from the Territory.[11]

(Third) Chapter 5, Extraordinary Session Laws of Alaska 1955 was enacted by the Territorial Legislature. This statute is a complete recompilation with appropriate additions and deletions, of all Territorial laws pertaining to employment security. No provision therein has any relevancy whatever to the issues in this litigation.

If it is the contention of the Court of Appeals that the above legislation obviated an emergency, its assumption is only partially true and subject to qualifi-

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[9]Annual Report of Alaska's Employment Security Commission, Fiscal Year ending June 30, 1955, page 1.

[10]Annual Report of the Alaska Employment Security Commission, supra.

[11]Annual Report, supra, page 1.

cation. A temporary emergency was alleviated in that the Federal loan permitted the payment of benefits that would otherwise have been stopped. However, a pressing emergency still exists and is in many respects more serious than it was in any previous time. It is a matter of public knowledge that the balance in the Alaska Unemployment trust fund as of April 30, 1956 is $1,254,290.37. Included in this amount is the $650,000 impounded by order of the District Court to be disbursed in the event the validity of amended Regulation No. 10 is not ultimately upheld. Also, the fund is indebted to the Federal Government for $3,000,000.00. It is readily apparent that the condition of Alaska's trust fund is in a state of extreme emergency and if the $650,000.00 involved in this litigation is paid out a further crisis may result.

In view of these considerations, it is inconceivable how the Court below can state that its decision has been validated and that an emergency has been obviated by subsequent legislation.

It is especially distressing to have the Court not even bother to pass upon, discuss or otherwise dispose of our arguments and contentions advanced to them by brief and oral argument. We believe that if the Court had seriously considered these contentions, it would have reversed the District Court and declared Regulation No. 10 to be valid. Instead, the Court of Appeals in two separate per curiam opinions, without citing a single judicial authority in support of its conclusion, or even mentioning our main contentions, adversely decided an issue of vital and far-reaching im-

portance to the people of the Territory of Alaska on what we feel to be an unduly technical and manifestly erroneous ground.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, Juneau, Alaska,
September 14, 1956.

Respectfully submitted,

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(Appendices Follow.)